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84-1759

No._____

In The
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

T.G.&Y. STORES, INC.,
Petitioner,

vs.

SOLOMON LUSBY, VAUGHN LUSBY
and ALVIN JERARD LUSBY,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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May, 1985

HAPP

QUESTIONS PRESENTED

#1. Whether action under color of state law is present under 42 U.S.C. §1983 when a private mercantile establishment files a citizen's complaint against a suspected shoplifter in a municipality wherein the local police department has created a uniform internal policy of not independently investigating such citizen's complaints filed by private mercantile establishments prior to taking custody of that suspected shoplifter?

#2. Whether action under color of state law is present under 42 U.S.C. §1983 when a private mercantile establishment seeks to obtain a release of all civil liability from a suspected shoplifter in exchange for the dismissal of all criminal charges brought by way of a citizen's complaint against that suspected shoplifter?

PARTIES INVOLVED

The Petitioner herein, the defendant-appellant below, is T.G.&Y. Stores, Inc., a corporation incorporated in the State of Delaware, with its principal place of business being in the State of Oklahoma. T.G.&Y. Stores, Inc., is correctly named T.G.&Y. Stores, Co., and is a wholly owned subsidiary of Household Merchandising, Inc. Additional defendants-appellants were the City of Lawton, Oklahoma, a municipal corporation organized and existing under the laws of the State of Oklahoma, Charles Gent, who at the time of the pertinent incident was a security guard for T.G.&Y. Stores, Inc., and an off duty policy officer for the City of Lawton, and Steven Wertz and Kent Dunegan, who were police officers for the City of Lawton.

The Respondents, the plaintiffs-appellees below, are Solomon Lusby, Vaughn Lusby and Alvin Jerard Lusby, individuals who are citizens of the State of Oklahoma.

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and ALVIN JERARD LUSBY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in these proceedings on November 23, 1984.

OPINION BELOW

The Opinion of the United States Court of Appeals for the Tenth Circuit is reported at 749 F.2d 1423 and is reproduced as Appendix "A" hereto. A timely petition for rehearing was denied on January 9, 1985 and the Order of the United States Court of Appeals for the Tenth Circuit is reproduced as Appendix "B" hereto.

JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit was entered on November 23, 1984. A timely petition for rehearing was denied on January 9,

1985. Mr. Justice White entered an order extending the time for the filing of this petition to and including May 9, 1985. The jurisdiction of this Court is invoked under the provisions of Title 28, United States Code, Section 1254(1).

STATUTORY PROVISIONS

42 U.S.C. Section 1983 provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . .

22 O.S. §§1291-1294 provide:

> §1291. Misdemeanor may not be compromised, when
>
> When a defendant is held to answer on a charge of misdemeanor, for which the person by the act constituting the offense has a remedy by a civil action, the offense may be compromised as provided in the next section, except when it was committed:
>
> 1. By or upon an officer of justice while in the execution of the duties of his office.
>
> 2. Riotously; or,
>
> 3. With an intent to commit a felony.
>
> §1292. Prosecution compromised, when
>
> If the party injured appear before the court to which the deposition and statement are required to be returned at any time before trial,

on an indictment or information for the offense, and acknowledge in writing that he has received satisfaction for the injury, the court may, in its discretion, on payment of the costs incurred, order all proceedings to be stayed upon the prosecution and the defendant to be discharged therefrom. But in that case the reasons for the order must be set forth therein and entered upon the minutes.

§1293. Compromise of prosecution as bar

The order authorized by the last section is a bar to another prosecution for the same offense.

§1294. Compromise of prosecution forbidden, when

No public offense can be compromised, nor can any proceedings for the prosecution or punishment thereof, upon a compromise, be stayed, except as provided in Sections 6113 and 6114 (Sections 1291 and 1292 of this title).

STATEMENT

The Petitioner, T.G.&Y. Stores, Inc., (T.G.&Y.) is a private corporation, incorporated in the State of Delaware, with its principal place of business being in the State of Oklahoma. This case arises out of an incident which occurred on July 6, 1979 in a T.G.&Y. Store in Lawton, Oklahoma.

On that date Solomon Lusby, Vaughn Lusby and Alvin Jerard Lusby, arrived at the Sheridan Road T.G.&Y. Store in Lawton, Oklahoma. The evidence at trial indicated that there is some dispute concerning exactly what these three individuals did inside the T.G.&Y. Store, however, it was admitted that Solomon Lusby left the store prior to the other two individuals. Vaughn Lusby indicated that he exited the check out

line twice. The first time through he claimed he purchased a pair of sunglasses. On the second trip through he allegedly purchased some hair spray. The evidence is uncontroverted, however, that Vaughn Lusby was observed exiting the check out stand with a new pair of T.G.&Y. sunglasses which, during this second trip through the check out line, were not paid for.

After Vaughn Lusby exited the store, Charles Gent, a T.G.&Y. security guard, who was also an off duty Lawton police officer, approached Vaughn Lusby and inquired whether he had a receipt for the sunglasses. Mr. Lusby indicated that he did not have such a receipt. At that point Charles Gent displayed a badge and requested that Vaughn Lusby return to the store. According to the testimony, it is T.G.&Y.'s policy to request that a suspect accompany the security officer back into the store so that the investigation can continue.

After the two men returned to the store, as they were proceeding to the rear of the store, Vaughn Lusby raised his voice, allegedly to attract the attention of the cashier who sold him the sunglasses. At this point a struggle erupted which eventually included all three Lusby brothers and several T.G.&Y. employees. The evidence concerning the events that followed is disputed. Eventually, however, the situation was brought under control with the Lusby brothers being taken to the rear of the T.G.&Y. Store. Thereafter, the Lawton Police Department was summoned and officers Wertz and Dunegan arrived at the store to take charge of the suspects. After the Lusbys were taken to jail, Charles Gent traveled to the Lawton police station and completed the necessary paper work relating to the incident. Although various charges were filed against the Lusby brothers, the City of Lawton dropped all charges at a later point in time.

The Respondents originally filed their Complaint in the United States District Court for the Western District of Oklahoma on June 23, 1980 invoking both federal

question and pendent jurisdiction. Included within this original Complaint were numerous theories of recovery among which were false arrest, assault and battery, malicious prosecution and a violation of 42 U.S.C. §1983. This Complaint also charged that Charles Gent had singled out members of Lawton's black community for physical and mental harassment and that T.G.&Y. was aware of his past conduct in this regard. Also included within the original Complaint were allegations against T.G.&Y. and Charles Gent concerning conspiracy and defamation.

The Respondents later filed a Second Amended Complaint restating these allegations previously advanced, which included new allegations to the effect that T.G.&Y. was guilty of grossly inadequate supervision of its security guards. Further, the Respondents alleged that T.G.&Y. surrendered the management of its security guards to an off-duty Lawton police officer who was aware of Charles Gent's racist attitudes and propensities for excessive violence. Finally, the Respondents charged that T.G.&Y. encouraged its security guards to utilize their "dual roles" as police officers to detain suspected shoplifters. At no time did the Respondents contend that any Oklahoma Statute was unconstitutional.

On July 27, 1981, T.G.&Y. and Charles Gent filed a Motion for Summary Judgment, or, in the Alternative, Partial Summary Judgment, attached to which were various affidavits attesting to the fact that racial prejudice had never motivated or influenced Charles Gent in the performance of his duties, and further attesting to the fact that T.G.&Y. had no notice of any instance of racial prejudice or excessive use of force attributable to Charles Gent. In the response filed in opposition to this Motion for Summary Judgment, the Respondents failed to offer any evidence demonstrating that T.G.&Y. had any prior notice of any instance where Charles Gent was guilty of racial discrimination and also failed to offer

any evidence demonstrating that T.G.&Y. had any prior notice of any instance where Charles Gent was guilty of excessive use of force. This Motion for Summary Judgment was overruled by the trial court on August 31, 1981.

Following the evidentiary portion of the trial in this matter, which commenced on September 16, 1981, the trial court submitted seven theories of liability to the jury as to each Respondent. On October 1, 1981 the jury returned a verdict in favor of Solomon Lusby against T.G.&Y. for liability on the §1983 claim and the false arrest claim. The total damages awarded against T.G.&Y. were fixed at $4,000.00. The jury returned a verdict in favor of Vaughn Lusby against T.G.&Y. for liability on the §1983 claim, the false arrest claim and the malicious prosecution claim. The total damages awarded against T.G.&Y. were fixed at $66,000.00, of which $50,000.00 was punitive damages. The jury returned a verdict in favor of Alvin Lusby against T.G.&Y. on the §1983 claim and the false arrest claim, fixing his damages against T.G.&Y. at $4,000.00.

T.G.&Y. filed its Motion for Remittitur, New Trial or Judgment Notwithstanding the Verdict, on December 28, 1981, which was later denied by the United States District Court for the Western District of Oklahoma on June 2, 1982. An appeal was commenced by T.G.&Y. to the United States Court of Appeals for the Tenth Circuit, by way of Notice of Appeal filed on June 28, 1982. The principal issues raised by T.G.&Y. on appeal included whether the trial court had erred in allowing the jury to find T.G.&Y. liable under §1983 where plaintiffs failed to offer evidence to support any recognized test for state action as to T.G.&Y., whether §1983 should be extended so far as to impose a federal duty upon a private mercantile corporation to hire, train and supervise employees; and, whether the evidence was sufficient to allow the jury to determine whether a customary plan existed between T.G.&Y. and the Lawton Police Department. The United States Court of Appeals for the Tenth Circuit

affirmed the trial court's judgment by way of its November 23, 1984 Opinion, now reported at 749 F.2d 1423 (10th Cir. 1984).

On December 24, 1984, T.G.&Y. filed a Petition for Rehearing in the United States Court of Appeals for the Tenth Circuit. In this Petition for Rehearing the Petitioner asserted that the Court's opinion as promulgated was inconsistent with the analysis mandated by the Supreme Court of the United States, specifically asserting that the Court's conclusion regarding the alleged customary plan was not supported in the record. (Additionally, the Petitioner asserted that the Court had failed to address one of the critical issues in the appeal, that involving whether T.G.&Y., in relying on the City of Lawton for the training of security personnel, became thereby a state actor. Finally, the Petitioner urged that the Court had acted in contravention of the state law of Oklahoma when it found that the jury had been erroneously instructed as to damages, but found that said error was harmless.) By way of a January 9, 1985 Minute Order, the Petitioner was informed that its Petition for Rehearing was denied.

REASONS FOR GRANTING THE WRIT

The questions raised in this Petition for Writ of Certiorari have not previously been addressed by this Court. The critical question involved herein is whether a private mercantile establishment, under the facts presented in this case, can properly be found to have acted under color of state law. The Court of Appeals for the Tenth Circuit made two findings in this regard; the first being that T.G.&Y. and its managers acted under color of state law by acting in concert with the Lawton Police Department according to a customary plan for dealing with suspected shoplifters. Secondly, the Court of Appeals for the Tenth Circuit found that T.G.&Y. acted under color of state law when it violated the plaintiffs' constitutional rights in using the threat of criminal charges as a bargaining chip for a release of civil liability.

While this Court has on many occasions considered different aspects of the scope of §1983, this Court has, however, not had occasion to consider the precise questions presented herein. These questions are of extreme importance in determining the extent to which private individuals or entities may find themselves deemed acting under color of state law, and thus, potentially liable under 42 U.S.C. §1983.

I.

APPLICABLE CONSTITUTIONAL PRINCIPLES AND DECISIONS OF THIS COURT SUPPORT THE PROPOSITION THAT THE PETITIONER WAS NOT ACTING UNDER COLOR OF STATE LAW.

A. Decision of the United States Court of Appeals for the Tenth Circuit

Petitioner believes it extremely important to summarize the major findings of the United States Court of Appeals for the Tenth Circuit, found at 749 F.2d 1423 (10th Cir. 1984). The underlying grounds for the bringing of the lawsuit have previously been summarized. However, Petitioner wishes to stress various findings of fact with regard to crucial elements bearing on the question of "color of state law". Critical to this discussion is a summary of the events, as determined by the United States Court of Appeals for the Tenth Circuit, surrounding the arrest of the Respondents.

The Appellate Court found that the security guard working for the Petitioner, after stopping Vaughn Lusby, placed Mr. Lusby under arrest on the spot, before he had any opportunity to question either Mr. Lusby or other witnesses or to ascertain what had happened. Further, the Appellate Court found that the security guard later went to the police station to finish paper work on this incident and used police documents to get information to complete the citizen's arrest forms. With regard to the actions of the Lawton police officers, the

Court of Appeals found that the officers picked up the Respondents, handcuffed and frisked them and took them to jail without interviewing witnesses or conducting any inquiry to determine whether probable cause existed to arrest them. These officers relied entirely on the word of the security guard and took these actions before he had completed a citizen's arrest form.

The Court found that the officers made no independent investigation of the shoplifting and that the Lawton Police Chief testified that the police department routinely did not investigate a merchant's allegations of misdemeanor shoplifting before taking into custody suspects the merchant's employees detained through citizen's arrest. The Court concluded that the police department provided the Petitioner with special forms prepared for merchants who detained suspected shoplifters, which apparently allowed officers the discretion to issue a summons to a suspect when they arrived at the store without taking the person to jail. The security guard employed by T.G.&Y. was the individual who signed the citizen's arrest form as well as most of the criminal complaints. It is important to note that the Court found that under Oklahoma law (Okla. Stat. Ann. Tit. 22, §§1291-1294) the injured party could have requested the dismissal of the charges for which it received satisfaction. The Court of Appeals also found evidence that the City of Lawton never investigated the incidents charged against the Respondents, or if it did, that it left the charges pending despite overwhelming evidence that no shoplifting occurred.

The Court of Appeals recognized that a private entity employing an off duty police officer is not vicariously liable for its employee's deprivation of citizens' civil rights. The Court of Appeals did conclude, however, that T.G.&Y. and its managers acted under color of state law within the meaning of §1983 by acting in concert with the Lawton police according to a customary plan for dealing with shoplifters that involved a constitutionally forbid-

den rule or procedure. Specifically, the Court concluded that because Lawton's official policy was to not independently investigate citizens' allegations of misdemeanors prior to arresting suspects for those misdemeanors, the Petitioner had authority to bring its own criminal charges by initiating a citizen's complaint, knowing that the City would not exercise any check on these charges. Thus, the Court of Appeals concluded that the Petitioner exercised a "state inquisitorial right".

The Court of Appeals also concluded that the Petitioner had violated the Respondents' constitutional rights when it used the threat of criminal charges as a bargaining chip for a release of civil liability. More specifically, the Court found the evidence suggested that the Petitioner's policy was always to seek a release of liability as a condition for dropping criminal charges. Further, the Court concluded that the Petitioner had a special form made up that required suspects to confess their guilt and release the Petitioner, its officers and employees from all claims for damages.

B. Decisions Relied upon by the United States Court of Appeals for the Tenth Circuit

Upon reviewing the opinion of the Court of Appeals, it would appear that the Court relied primarily on a series of decisions from other jurisdictions in order to find that the Petitioner was liable by reason of some concert of action with the Lawton police pursuant to a customary plan for dealing with shoplifters. Specifically, the Court relied upon *El Fundi v. Deroche,* 625 F.2d 195 (8th Cir. 1980); *Duriso v. K-Mart,* 559 F.2d 1274 (5th Cir. 1977) and *Smith v. Brookshire Brothers, Inc.,* 519 F.2d 93 (5th Cir. 1975), *cert. denied,* 424 U.S. 915, 96 S.Ct. 1115, 47 L.Ed 2d 320 (1976). The basic holding of each case (decided on its own particular factual situation) was that state action may be found when private security guards act in concert with police officers or pursuant to

customary procedures agreed to by police departments; particularly when a state statute authorizes merchants to detain suspected shoplifters.

It should be noted that the Court of Appeals did not cite any authority in support of its finding that the Petitioner acted under color of state law in using the threat of criminal charges as a bargaining chip for a release of civil liability. The Court of Appeals also relied upon the case of *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937, 102 S.Ct. 2744, 2754, 73 L.Ed.2d 482 (1982).

C. Recent Decisions of Importance in Determining the Issues Before this Court

It is well recognized that two elements are necessary to establish a claim under the provisions of 42 U.S.C. §1983. First, the Respondents must prove that the Petitioner has deprived them of a right "secured by the Constitution and laws" of the United States. Second, the Respondents must show that the Petitioner deprived them of this constitutional right "under color of any statute, ordinance, regulation, custom, or usage, of any state or territory." *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 150, 90 S.Ct. 1598, 1604, 26 L.Ed.2d 142 (1970). This second element has been found to require that a plaintiff show that a defendant acted "under color of" state law. *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 156, 98 S.Ct. 1729, 1733, 56 L.Ed.2d 185 (1978). The rationale given for imposing such a requirement is to assure that constitutional standards are invoked only when it can be said that the state is responsible for the specific conduct of which the plaintiff complains. This assurance is particularly important where a complaining party seeks to hold the state liable for the actions of private parties. *Blum v. Yaretsky*, 457 U.S. 991, 102 S.Ct. 2777, 2786, 73 L.Ed.2d 534 (1982).

The general test for determining whether a private individual has acted under color of state law was articulated by this Court in the case of *Adickes v. S.H. Kress &*

Co., supra, 398 U.S. at 152, 90 S.Ct. at 1605, in the context of an equal protection deprivation. This test, in pertinent part, stated:

> Private persons, jointly engaged with state officials in the prohibited action, are acting "under color" of law for purposes of the statute. To act "under color" of law does not require that the accused be an officer of the State. It is enough that he is a willful participant in joint activity with the State or its agents.

The Petitioner asserts that there was no evidence presented in the trial of this action establishing such willful participation in a joint activity with the City of Lawton. Rather, the evidence, even as summarized by the Court of Appeals, was to the effect that the City of Lawton had imposed a uniform policy of noninvestigation for shoplifting complaints of merchants. Further, there was no evidence presented establishing that the Petitioner had any knowledge of such customs, and in particular there was no evidence presented demonstrating any agreement between the Petitioner and the Lawton Police Department. Rather, the evidence presented at trial demonstrated the mere filing of a citizen's complaint by a private individual or entity by use of the exclusive method available.

The effect of the holding of the United States Court of Appeals for the Tenth Circuit is to find that whenever a private individual or entity registers a citizen's complaint with a police department whose internal practice is not to investigate the complaint before taking the accused into custody, that private individual or entity may be found to have been acting in concert with the police department under a customary plan. The Petitioner urges that such a result is totally contrary to the constitutional principles reflected in numerous decisions of this Court, and is an extension of the scope of §1983 far beyond its intended parameters.

A most appropriate warning was voiced by the Federal District Court in *Lee v. Patel,* 564 F.Supp. 755, 760-761 (E.D.Va. 1983):

> If a citizen who has been a victim of a crime, or believes himself to be the victim of a crime, is engaged in State action under color of State law when he swears out a warrant, then he is also engaged in State action when he drives on the right hand side of the highway, or pays his State taxes, or conveys title to an automobile through the State Division of Motor Vehicles, or records the deed to his property, obtains a marriage license or probates his will. Most everything we do in our intercourse with others we do by virtue of or under authority of State law. If *that* is what is meant by action under color of state law then the Bill of Rights, which was intended to protect us from tyranny from the central government, will have proven to be the source of a terrible interference by private citizens in the lives of their fellow citizens through the medium of the federal courts. For this Court to adopt "such a holding would utterly emasculate the distinction between private as distinguished from state conduct . . ." *Moose Lodge No. 107 v. Irvis,* 407 U.S. 163, 173, 92 S.Ct. 1965, 1971, 32 L.Ed.2d 627 (1972).

Although the Court of Appeals relied upon the case of *Lugar v. Edmondson Oil Co.,* 457 U.S. 922, 102 S.Ct. 2744, 73 L.Ed.2d 482 (1982), a case totally factually distinct from the case at bar, this Court's Opinion in that case (footnote 21) explicitly limits the holding therein to a prejudgment attachment case.

The second issue before this Court, as previously stated herein, is whether the Petitioner violated the Respondents' constitutional rights when it used the threat of a criminal charge as a bargaining chip for re-

lease of civil liability. Noticeably absent from the Court of Appeals' Opinion is any citation of authority in support of this finding. The Petitioner asserts that the finding of the Court of Appeals is erroneous, and that the alleged actions of this Petitioner, even if accepted as true, did not constitute an act under color of state law such that the Petitioner came within the provisions of §1983. At most, the alleged actions constituted a misuse of a state statute, that statutory authority being contained at 22 O.S. §§1291-1294. (It should be noted that the statutory provision cited by the Court of Appeals does not vest total control over criminal charges with the complaining party.) This Court, in *Lugar v. Edmondson Oil Co., supra,* 102 S.Ct. 2744, emphasized that a complaint that does not challenge the constitutionality of a state statute but merely alleges misuse of the state statute by a private person does not state a cause of action under §1983 but challenges only private action. This Court noted that private misuse of a state statute does not describe conduct that can be attributed to the State.

Whether the Petitioner did in fact have a special form made up that required suspects to confess their guilt and release the Petitioner, its officers and employees from all claims for damages, and whether the Petitioner attempted to use the threat of criminal charges as a bargaining chip for the release of civil liability under such a form, simply has no bearing on the question of whether the Petitioner acted under color of state law. Although applicable Oklahoma law allowed the Petitioner to bring criminal charges against the Respondents, the potential misuse of that statutory authority does not establish such involvement with the State as to bring the Petitioner within the provisions of §1983. Clearly, the actions of the Petitioner were not such as to be fairly attributable to the State.

CONCLUSION

The issues brought before this Court are of concern to every private individual and entity in the United States. The decision reached by the United States Court of Appeal for the Tenth Circuit in the instant case has created a situation in which each private individual and entity is potentially liable under the provisions of 42 U.S.C. §1983 although said private individual or entity does not truly act in concert with a state entity. The scope of the protections of 42 U.S.C. §1983, and its application to the conduct of a private individual or entity in the position of the Petitioner herein, are federal questions which should be addressed and resolved by this Court.

For all of the above reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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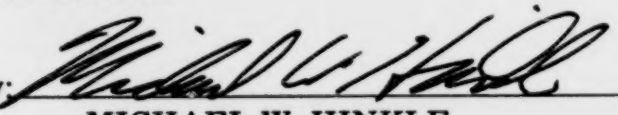
By: 

MICHAEL W. HINKLE
Counsel for Petitioner

May, 1985

APPENDICES

Appendix A: OPINION BELOW

Decision of the United States Court of Appeals for the Tenth Circuit filed November 23, 1984, and reported 749 F.2d 1423 (1984)

[NOTE: Footnotes are set out as endnotes and follow the text of the opinion]

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

SOLOMON LUSBY, VAUGHN LUSBY and ALVIN JERARD LUSBY, Plaintiffs-Appellees,	)	
v.	)	Nos. 82-1721 & 82-1779
T.G.&Y. STORES, INC., an Oklahoma corporation; CITY OF LAWTON, OKLAHOMA, a municipal corporation; CHARLES GENT; STEVE WERTZ; and KENT DUNEGAN, Defendants-Appellants.	)	

Appeal from the United States District Court
For the Western District of Oklahoma
(D.C. No. CIV-80-751-W)

Russell D. Bennett, City Attorney, (Gerald S. Rakes, Assistant City Attorney, with him on the briefs), Lawton, Oklahoma, for Defendants-Appellants City of Lawton, Steve Wertz, and Kent Dunegan.

Michael W. Hinkle (Page Dobson and Ronald R. Hudson with him on the briefs) of Holloway, Dobson, Hudson & Bachman, Oklahoma City, Oklahoma, for Defendants-Appellants T.G.&Y. Stores, Inc., and Charles Gent.

Gretchen A. Harris (Jack L. Kinzie, also of Andrews Davis Legg Bixler Milsten & Murrah, Oklahoma City, Oklahoma, and Linda G. Scoggins of Spradling, Alpern, Friot & Gum, Oklahoma City, Oklahoma, with her on the briefs) for Plaintiffs-Appellees.

Before LOGAN and McWILLIAMS, Circuit Judges, and CAMPOS, District Judge.*

LOGAN, Circuit Judge.

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*Honorable Santiago E. Campos, United States District Judge for the District of New Mexico, sitting by designation.

These appeals arise out of judgments in favor of plaintiffs Solomon Lusby, Vaughn Lusby, and Alvin Lusby — three brothers — who asserted civil rights and pendent state tort claims against the City of Lawton, Oklahoma, two of its police officers, Kent Dunegan and Steve Wertz, T.G.&Y. Stores, Inc., and Charles Gent, another Lawton police officer who was serving while off-duty as a security guard at a T.G.&Y. store in Lawton at the time of the disputed incidents. The jury returned a verdict for all plaintiffs on their 42 U.S.C. §1983 claims against each of the defendants. On the pendent claims there were differences in the verdicts: on false arrest Solomon and Alvin won against all defendants although Vaughn won only against Gent and T.G.&Y.; on malicious prosecution Solomon and Alvin received a verdict only against Wertz, Dunegan, and the city, and Vaughn succeeded only against Gent and T.G.&Y.; on assault and battery only Alvin prevailed and only against Wertz. The verdict form did not require the jury to separate damages on the particular claims, except among the categories actual, nominal, and punitive. The judgments against each defendant were as follows (all actual damages except as indicated):

	Solomon	Vaughn	Alvin
Gent	$1,000	$ 3,000	$ 2,000
T.G.&Y.	4,000	16,000 & 50,000 punitive	4,000
Wertz	2,000	1,000	2,000
Dunegan	2,000	1,000	1,000
City of Lawton	6,000	4,000	10,000

The jury found for the plaintiffs on defendant Gent's counterclaim for assault and battery. The trial court entered judgment on the verdicts and awarded attorney's fees to plaintiffs pursuant to 42 U.S.C. §1988.

The city and police officers Wertz and Dunegan appeal, contending that the trial court erred (1) in failing to grant a directed verdict in favor of the city and the

officers on the §1983 claims; and (2) in refusing to dismiss the pendent claims because plaintiffs did not comply with the Oklahoma Political Subdivision Tort Claims Act, Okla. Stat. Ann. tit. 51, §§151-170. Gent and T.G.&Y. appeal separately, arguing that the trial court erred (1) in refusing to instruct the jury on the qualified immunity Gent asserted as a defense to the §1983 claims; (2) in permitting the jury to find that T.G.&Y. and Gent acted under color of state law for purposes of §1983; (3) in permitting the jury to assess punitive damages against T.G.&Y.; (4) in allowing plaintiffs to introduce evidence of Gent's character from his police personnel file; and (5) in instructing the jury regarding damages for future medical expenses and loss of earning capacity. Additionally, all defendants contend that the trial court erred in awarding attorney's fees in excess of the amount provided under plaintiffs' contingent fee agreement with their attorneys.

I

This dispute arose when plaintiffs stopped at a T.G.&Y. store in Lawton, Oklahoma, on July 6, 1979. Vaughn Lusby and Alvin Lusby entered the store and Vaughn selected a pair of sunglasses. Substantial evidence supports the jury's implicit finding that Vaughn went through the checkout line and paid for the sunglasses, and then decided to return to buy some hairspray. Carrying the sunglasses, Vaughn entered the checkout line again and paid for the hairspray. David Jamison, an assistant manager at the store, saw Vaughn pass through the checkout line the second time, carrying the sunglasses, but not paying for them. Jamison summoned Charles Gent, an off-duty Lawton police officer employed by T.G.&Y. as a plain clothes security guard, to investigate.

Gent stopped Vaughn outside the store and asked him for the receipt for the sunglasses. Vaughn explained that he had paid for the glasses but had lost the receipt. Gent showed Vaughn his badge and told him

that he was a Lawton police officer acting as a security guard and that Vaughn was under arrest for shoplifting. Gent and Vaughn went back inside the store to pursue the matter.

Two altercations then occurred, the precise details of which the parties dispute. Upon reentering the store Gent immediately sought to escort Vaughn to a back room. On the way to the rear of the store Vaughn stopped and raised his voice, apparently in an attempt to get the cashier's attention. Gent grabbed Vaughn around the throat using a chokehold. Vaughn struggled to loosen Gent's grip; then Gent and other T.G.&Y. employees pinned Vaughn. Solomon and Alvin, having entered the store to see what was wrong, saw the T.G.&Y. employees wrestling with their brother and came to his aid. Another struggle ensued. During this struggle Solomon struck Gent and knocked his glasses off, and Alvin shoved Gent. At some point, Gent struck at least one of the plaintiffs with a pistol. Eventually that struggle ended, and plaintiffs and Gent went to a back office in the store.

In a few minutes Lawton police officers Wertz and Dunegan arrived at the store and took plaintiffs into custody. When they arrived at the police station, another altercation occurred. Again, the parties dispute the precise events. Plaintiffs testified that Wertz hit Alvin in the face and pushed his head into a brick wall. Once inside the jail, plaintiffs were subjected to strip searches, allegedly because Wertz and Dunegan found marijuana paraphernalia in Solomon's possession. Plaintiffs were charged with various offenses: petty larceny (Vaughn, assault and battery (Alvin, Solomon, and Vaughn), assault on a police officer (Alvin), damaging private property (Alvin), resisting arrest (Vaughn and Solomon), disobeying a lawful order (Alvin), and possession of marijuana (Solomon). Seven months later the city dropped all charges and plaintiffs filed this suit. Meanwhile the T.G.&Y. managers checked with the cashier

from whom Vaughn bought the hairspray. Although there is a conflict, the evidence overwhelmingly suggests that the cashier believed Vaughn had paid her for the sunglasses and reported this to the T.G.&Y. managers shortly after the incident.

II

The jury found all defendants liable for a violation of the Civil Rights Act of 1871, 42 U.S.C. §1983. The provisions of §1983 only apply to persons who both deprive others of a right secured by the Constitution or laws of the United States and act under color of a state statute, ordinance, regulation, custom, or usage. See *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 150 (1970). Defendants contend on appeal that one or both of these elements is missing with respect to the Lusbys' claims. The §1983 liability of the various defendants rests on separate theories, so we consider each separately.

A

Charles Gent contends that he was not acting under color of state law while employed at the T.G.&Y. store. Alternatively, he contends that if he was so acting he is not liable because he is entitled to a qualified immunity generally accorded to law enforcement officials.

At the time Gent allegedly committed the civil rights violations, he was an off-duty Lawton police officer employed as a part-time security guard at T.G.&Y.'s store in Lawton. Gent was not wearing a police uniform, although he apparently had his police badge with him as well as a Derringer pistol — not a police issue weapon — borrowed from a fellow officer.

We must consider the circumstances under which an off-duty police officer working as a security guard acts under color of state law for purposes of a civil rights claim.[1] In *Griffin v. Maryland*, 378 U.S. 130 (1964), the Supreme Court found state action when an amusement park security guard who had been deputized as a sheriff

of the county, wore a badge, and identified himself as a deputy sheriff, arrested black park patrons who refused to leave the park in response to his order. The Supreme Court there declared, "If an individual is possessed of state authority and purports to act under that authority, his action is state action. It is irrelevant that he might have taken the same had he acted in a purely private capacity or that the particular action which he took was not authorized by state law." *Id* at 135.

The Supreme Court may now apply a somewhat more restrictive test. In discussing the interrelationship of the "state action" requirement of the Fourteenth Amendment and the "color of state law" requirement of 42 U.S.C. §1983 in another context, the Court described a two-part test for determining whether conduct allegedly depriving a plaintiff of a federal right is fairly attributable to the state: (1) "the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible," and (2) the depriving party must be "a person who may fairly be said to be a state actor." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 927 (1982). The Supreme Court proceeded to describe how the concepts of state action and color of state law collapse into each other when the depriving party is one "whose official character is such as to lend the weight of the State to his decision," but are different when the constitutional claim is against a private party. *Id.* at 941. See also *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982) ("[A] State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State.")

There is evidence in the record that both before and after the Lusbys' arrest, defendant Gent was acting as an on-duty police officer. When Gent accosted Vaughn Lusby, Gent flashed his badge and identified himself as a

Lawton police officer working as a security guard for T.G.&Y. According to Vaughn, Gent told Vaughn moments after he stopped him that he was going to jail. Gent denied this, but conceded that he placed Vaughn under arrest on the spot, before Gent had had any opportunity to question Vaughn or other witnesses or ascertain what had happened.[2] After the arrest Gent went to the police station to finish his paperwork on the Lusby incident. He used police documents to get information to complete the citizen's arrest forms. In addition there was evidence suggesting that Gent wanted to file charges against Alvin for assault on a police officer even though Gent was not acting as a police officer at the time he got into an altercation with Alvin and Solomon in the T.G.&Y. store.[3] *Griffin* and many other cases would appear to treat this as sufficient without more.[4]

If we view Gent as a private person who could be held liable only under the *Lugar* test, there is sufficient evidence of cooperation with the Lawton police department to conclude that he acted under color of state law. The testimony was that Officers Wertz and Dunegan picked up the Lusbys, handcuffed and frisked them and took them to jail without interviewing witnesses or conducting any inquiry to determine whether probable cause existed to arrest them. They relied entirely on Gent's word and before he completed a citizen's arrest form. The officers made no independent investigation of the shoplifting, which would have shown that Vaughn Lusby had paid for the glasses. The Lawton police chief testified that the police department routinely did not independently investigate a merchant's allegations of misdemeanor shoplifting before taking into custody suspects the merchant's employees detained through citizen's arrest. In fact, the police department provided T.G.&Y. with special forms prepared for merchants who detained suspected shoplifters which apparently allowed officers the discretion to issue a summons to a suspect when they arrived at the store, without taking

the person to jail. Thus, if we treat Gent as a private party, the local police followed a policy that allowed him to substitute his judgment for that of the police. Such cooperative activity between the police department and a private party is sufficient to make Gent a party acting under color of state law.[5]

Mindful of the Supreme Court's declaration in *Baker v. McCollan,* 443 U.S. 137, 142 (1979), that not every tort amounts to a deprivation of constitutional rights, we must determine whether a reasonable jury could have found Gent's conduct amounted to a violation actionable under §1983. Malicious prosecution does not automatically constitute a denial of due process. Nevertheless, if the misuse of the legal procedure is egregious there may be a deprivation of constitutional dimensions for which a plaintiff can invoke §1983. *Norton v. Liddel,* 620 F.2d 1375, 1378 (10th Cir. 1980); see also *Cline v. Brusett,* 661 F.2d 108, 112 (9th Cir. 1981). We believe that when private parties or public officials use criminal complaints to coerce a release of civil liability from injured persons, this action, as a malicious prosecution, is egregious and qualifies as a deprivation of due process that violates the Fourteenth Amendment. *Cf. MacDonald v. Musick,* 425 F.2d 373, 375 (9th Cir.), *cert. denied,* 400 U.S. 852 (1970) ("It is no part of the proper duty of a prosecutor to use a criminal prosecution to forestall a civil proceeding by the defendant against policemen, even where the civil case arises from the events that are also the basis for the criminal charge."); *Dixon v. District of Columbia,* 394 F.2d 966, 969 (D.C. Cir. 1968) (condemning agreement in which prosecutor bargained not to press criminal charges if injured party would release police officers from all civil liability).

The plaintiffs presented evidence of several instances of Gent's actions that, viewed as a whole, represent a denial of due process. Gent initially participated in bringing the charges against all three plaintiffs. Gent signed the citizen's arrest forms as well as

most of the criminal complaints. Moreover, under Oklahoma law, Gent, as one of the injured parties, could have requested the court to drop those charges for which he received satisfaction. Okla. Stat. Ann. tit. 22, §1291-1294. Thus, Gent could have sought to have the charge of damaging private property dismissed after he received compensation for his broken eyeglasses, which, except for a few clay pots, was the only property destroyed in the T.G.&Y. scuffle. Instead, Gent and T.G.&Y. actively bargained with the Lusbys, seeking a release of civil liability before they would drop the charges. Such bargaining was outrageous in light of Gent's failure to question the T.G.&Y. cashier to see if Vaughn had paid for the sunglasses, and T.G.&Y.'s managers' knowledge moments after the incident that the cashier remembered selling a pair of sunglasses to a black man, whose face she never looked at, minutes before she sold hairspray to Vaughn Lusby. The latter evidence could have persuaded the jury that Gent and T.G.&Y. knew soon after the incident that the shoplifting charge against Vaughn was groundless, yet both Gent and T.G.&Y. kept this information from the prosecutor so that charges were left pending for over seven months. Therefore, we must uphold the jury's verdict in favor of Vaughn Lusby's §1983 claim against Gent.

Gent did not initiate the charges against Solomon and Alvin that arose after Wertz and Dunegan took them into custody, and it is not clear that he knew that those charges were groundless. Nevertheless, we conclude that the jury reasonably could have found Gent's conduct in connection with the other charges against Solomon and Alvin an unconstitutional violation of due process. His failure to seek to have the charges dismissed once he had overwhelming evidence that Vaughn had paid for the sunglasses could be regarded as an egregious case of malicious prosecution. In so holding, we note that Oklahoma law permits suspects reasonably to resist an unlawful arrest by a peace officer who attempts

to arrest the suspect for a misdemeanor not committed in the officer's presence. *Sandersfield v. State*, 568 P.2d 313, 315 (Okla. Crim. App. 1977) (per curiam); *Walters v. State*, 403 P.2d 267, 275 (Okla. Crim. App. 1965). Relatives of a suspect are privileged to come to the suspect's aid as long as the suspect himself is justified in using self-defense against excessive force by a police officer. *Carter v. State*, 507 P.2d 932, 933-34 (Okla. Crim. App. 1973). Therefore, the jury could have concluded that Solomon's and Alvin's attempts to free Vaughn from Gent's chokehold were privileged assaults and batteries. Consequently, for Gent and T.G.&Y. to use such charges as a bargaining chip in exchange for a release of civil liability also violated Solomon's and Alvin's constitutional rights.

Finally, Gent may not escape liability for his constitutional violations by invoking the qualified immunity accorded to state officials. He was not entitled to an instruction on qualified immunity because even if he qualified for such immunity once he slipped into his police role during the T.G.&Y. incident, he forfeited it by acting unreasonably when he investigated the alleged shoplifting. See *Allred v. Syarczkopf*, 573 F.2d 1146, 1153 (10th Cir. 1978). The law evaluates such conduct primarily by objective standards, determining whether a reasonable person would have known he was violating a constitutional or statutory right. *Harolow v. Fitzgerald*, 457 U.S. 800, 818 (1982). In this case there is evidence that Gent did not check with the clerk operating the checkout line to see if Vaughn paid for the sunglasses. Moreover, Gent refused to let Vaughn get the cashier's attention at a time when her memory would still have been fresh.

B

The City of Lawton contends that the district court erred in refusing to direct a verdict for the city on plaintiffs' §1983 claims. A city is not liable under the doctrine

of respondeat superior in a §1983 suit. *Monell v. Department of Social Services*, 436 U.S. 658, 690-91 (1978). Lawton is liable under §1983 only if the police officers deprived plaintiffs of their constitutional rights pursuant to a policy or custom of the city. *See id.*

As noted above, the record contains evidence of an impermissible city policy that delegates a nondelegable duty and facilitates private abuse of criminal charges. The Lawton police department did not routinely investigate merchants' allegations of shoplifting before arresting suspects that the merchant designated. The Lawton police chief testified that his department had a policy of not conducting any independent investigation before taking a person into custody who has been made the subject of a citizen's arrest. In addition, the Lawton Police Department provided T.G.&Y. with special forms that the police prepared for merchants who detained suspected shoplifters. These forms apparently allowed city police officers discretion to issue a summons to suspects when they arrived at the store, without taking the suspects to jail.

That Officers Wertz and Dunegan adhered to this policy of no independent investigation is apparent from their testimony. They picked up the Lusbys, handcuffed and frisked them, and immediately took them to jail. They did not interview any witnesses or conduct any inquiry to determine whether probable cause existed to arrest. At the time Wertz and Dunegan took the Lusbys into custody Gent had not completed the citizen's arrest form. There is evidence that the city never investigated the incidents charged against plaintiffs, or if it did, that it left the charges pending despite overwhelming evidence that no shoplifting occurred. Therefore, the trial judge properly submitted to the jury the question of the City of Lawton's liability for a §1983 violation. As a result, we need not consider whether the city's policies for supervising and disciplining its police officers amounted to an unconstitutional procedure, or whether

allegations of police officer brutality sufficed to establish a pattern of such misconduct.

C

T.G.&Y. contends that the trial court erred in submitting to the jury plaintiffs' § 1983 claims against it because plaintiffs offered no evidence that T.G.&Y. acted under color of state law. T.G.&Y. is not liable for a civil rights violation simply because it employed Gent. We have held that a private entity that employs an off-duty police officer is not vicariously liable for its employee's deprivations of citizens' civil rights. *Draeger v. Grand Central, Inc.*, 504 F.2d 142, 146 (10th Cir. 1974); see also *Powell v. Shopco Laurel Co.*, 678 F.2d 504, 506 (4th Cir. 1982).

Nevertheless, T.G.&Y. and its managers acted under color of state law within the meaning of § 1983, because they were acting in concert with the Lawton police according to a customary plan for dealing with shoplifters that involved a constitutionally forbidden rule or procedure. See *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982). Because Lawton's official policy was to not independently investigate citizen allegations of misdemeanors prior to arresting suspects for such misdemeanors, T.G.&Y. had authority to bring its own criminal charges by initiating a citizen's complaint, knowing the city would not exercise any check on such charges. Thus, T.G.& Y. exercised a state inquisitorial right.

Acting under color of state law, T.G.&Y. violated the plaintiffs' constitutional rights when it used the threat of criminal charges as a bargaining chip for a release of civil liability. The evidence suggested that T.G.&Y.'s policy was always to seek a release of liability as a condition for dropping criminal charges. T.G.&Y. even had a special form made up that required suspects to confess their guilt and release T.G.&Y., its officers and employees from all claims for damages. This is the form that T.G.&Y. sought to have the Lusbys sign in order to

have the charges dropped. Accordingly, the jury could reasonably have concluded that T.G.&Y. was liable under § 1983.

Officers Wertz and Dunegan assert that the judgments against them based upon § 1983 must be reversed. Wertz and Dunegan do not contest that they acted under color of state law; they do contest the jury's finding that they deprived plaintiffs of a constitutional right.

We have no problems with Alvin Lusby's claims against Wertz and Dunegan based on Wertz' conduct while transporting Alvin to jail. A police officer's use of excessive force is actionable under § 1983 as a constitutional violation. *Garrick v. City of Denver*, 652 F.2d 969, 972 (10th cir. 1981); see also *Shillingford v. Holmes*, 634 F.2d 263, 265 (5th Cir. 1981). The plaintiffs presented ample evidence that Wertz struck Alvin on the face without cause while he was handcuffed outside the Lawton police station and then shoved Alvin head first into a wall on the way into the station. From this evidence the jury could have concluded that Wertz used excessive force against Alvin.

We find unpersuasive Dunegan's argument that he should not be liable for his failure to stop Wertz' assault upon Alvin. An officer who fails to perform a duty may be liable under § 1983 if that failure causes deprivation of protected rights. *McClelland v. Facteau*, 610 F.2d at 696. Thus, although Dunegan was not liable merely because he was present at the scene of a constitutional violation, *Russ v. Ratliff*, 538 F.2d 799, 805 (8th Cir. 1976), *cert. denied*, 429 U.S. 1041 (1977), he may be liable if he had the opportunity to intervene but failed to do so. *Hampton v. Hanrahan*, 600 F.2d 600, 626 (7th Cir. 1979) *rev'd in part on other grounds*, 446 U.S. 754 (1980) (per curiam); *Byrd v. Brishke*, 466 F.2d 6, 11 (7th Cir. 1972). Plaintiffs presented evidence suggesting that Dunegan could have prevented or stopped Officer Wertz' assault on Alvin Lusby. Thus, the trial court properly denied

Dunegan's motion for a directed verdict.

With respect to Vaughn's and Solomons' civil rights claims against Wertz and Dunegan, plaintiffs contend the officers conducted an unconstitutional strip search. Wertz and Dunegan, on the other hand, claim they conducted the strip search because they found a roach clip on Solomon and marijuana in the police car, allegedly placed there by one of the plaintiffs while being transported. They also claim to have received information that one of the Lusbys was carrying a large knife. A strip search is not improper when a suspect is going to be placed in the general jail population and has been charged with a drug offense such as possession of marijuana. See *Hill v. Bogans*, 735 F.2d 391, 394 (10th Cir. 1984). Although defendants presented no supporting evidence about the knife they thought a plaintiff might have or of the marijuana they claimed they found, we believe a reasonable jury could not find that the strip searches were unconstitutional and actionable under § 1983.

Plaintiffs also contend that Wertz' and Dunegan's arrest of plaintiffs at the T.G.&Y. store, based solely on Gent's accusations and without any independent police investigation to ascertain probable cause, supports the jury's finding of a civil rights violation. Police do not violate the Constitution when they arrest a person relying in good faith on a warrant that appears on its face to be valid but later provide deficient. *Baker v. McCollan*, 443 U.S. 137, 143-45 (1979). But they do violate the Constitution when they make a warrantless arrest without probable cause. See *Draeger v. Grand Central, Inc.*, 504 F.2d 142, 144-45 (10th Cir. 1974); *Patzig v. O'Neil*, 577 F.2d 841, 848 (3d Cir. 1978); *Duriso v. K-Mart*, 559 F.2d 1274, 1277 (5th Cir. 1977) (per curiam); *Sartin v. Commissioner of Public Safety*, 535 F.2d 430, 434 (8th Cir. 1976); *Street v. Surdyka*, 492 F.2d 368, 371-73 (4th Cir. 1974). We do not consider *Hudson v. Palmer*, 52 U.S.L.W. 5052 (U.S. July 3, 1984), and *Parratt v. Taylor*, 451 U.S. 527 (1981), to

require a different holding. Those cases involved deprivation of property, for which state post-deprivation remedies were considered adequate. A false arrest involves a deprivation of liberty; no post-deprivation remedy in the form of damages can ever fully compensate for time wrongfully spent in custody. See *Parratt*, 451 U.S. at 545 (Blackmun, J., concurring).

The trial court instructed the jury on the elements of probable cause and on Officer Wertz' and Dunegan's qualified immunity as police officers. There was sufficient evidence from which the jury could conclude that a reasonable police officer in Officer Wertz' and Dunnegan's position would have known he was violating the Lusbys' constitutional or statutory rights.[6] Therefore, the trial court acted properly with respect to the claims against Wertz and Dunegan, and we must affirm the jury's verdicts.

III

The City of Lawton and its police officers, Wertz and Dunegan, contend that the trial court erred in failing to dismiss plaintiffs' pendent state law claims against them as barred by the Oklahoma Political Subdivision Tort Claims Act, Okla. Stat. Ann. tit. 51, §§151-170. Section 156(B) of that act provides,

> "A claim against a political subdivision or employee shall be forever barred unless notice thereof is filed with clerk of the governing body of the political subdivision within one hundred twenty (120) days after the loss occurs."

Plaintiffs did not give written notice of their claims to the city clerk before they filed this suit.

The Oklahoma courts have not required strict compliance with §156(B). Instead, as the Oklahoma Supreme Court has emphasized, "The object of the statute must be kept in mind, and it should not be given a construction which will defeat the ends of justice." *Reirdon v. Wilburton Board of Education*, 611 P.2d 239, 241 (Okla.

1980) (footnote omitted). Thus, in *Duesterhaus v. City of Edmond*, 634 P.2d 720, 723 (Okla. 1981), the court held that the plaintiffs satisfied §156(B) by verbally notifying the city attorney of their claim against the city and negotiating with him concerning settlement. Although those plaintiffs did not strictly comply with §156(B), the court found that they substantially complied with that provision because they gave the city sufficient notice of their claim to fulfill the purposes of the statute: to give the city the opportunity to promptly investigate the claim, to repair any dangerous conditions, to quickly settle the claim if it was meritorious, and to prepare to meet any potential liability. *Id.*

Similarly, in this case, Lawton city employees Charles Gent and Eddie Hargraves tried to convince plaintiffs to enter into an agreement whereby plaintiffs would release the private party defendants from civil liability in exchange for dismissing the criminal charges against plaintiffs. As the trial court noted, "Obviously, the City had notice of possible civil claims which might be filed so that they could investigate the claims and determine their validity." Plaintiffs substantially complied with the notice provision within 120 days after they suffered their losses. Indeed, plaintiffs' malicious prosecution claim did not arise until after the prosecutor dismissed the charges against them. See *Coleman v. Strong*, 105 Okla. 282, 232 P.378, 379 (1925). Thus, as in *Duesterhaus*, plaintiffs' failure strictly to comply with the requirements of §156(B) did not undermine the purposes of the statute. Accordingly, we agree with the trial court that §156(B) does not bar plaintiffs' pendent claims.

IV

Gent argues that the trial court erred in permitting plaintiffs to introduce into evidence portions of Gent's police department personnel profile. Gent's psychological profile states, "this man is somewhat suspect in the

direction of trying to 'appear good' . . . Because of the possibility that Mr. Gent might tend to 'fake good' it may be necessary to observe him rather closely to determine if the personality characteristics noted above are actually a part of him." Plaintiffs' Ex. 17. The City of Lawton Employee Performance Evaluation states that during Gent's initial years of employment he had to "muster his inner resources to gain control of his temper . . ." Plaintiffs' Ex. 36. Contending that this evidence tends to show that he had a bad temper, Gent argues that the evidence is relevant only to show he acted in conformity with his character when he apprehended the Lusbys, an impermissible purpose under Fed. R. Evid. 404(a). Alternatively, even if the evidence is otherwise relevant, Gent contends that its prejudicial impact substantially outweighed its probative value. Fed. R. Evid. 403.

The statement in Exhibit 17 is not prejudicial. Although the statement in Exhibit tends to show that Gent at one time had a bad temper, it also indicates that Gent controlled it. The record is replete with evidence of Gent's conduct on the day he apprehended the Lusbys. We therefore are convinced that the challenged evidence did not affect the jury's verdict, and that if the trial court erred in admitting the evidence, it was harmless error.

V

The jury found T.G.&Y. liable to Vaughn Lusby on the §1983 claim and on the pendent claims of false arrest and malicious prosecution. It awarded punitive damages of $50,000 to Vaughn against T.G.&Y.. T.G.&Y. argues that none of its conduct was sufficiently outrageous to warrant the jury's award of punitive damages.

Punitive damages are available in a §1983 action when a "defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or

callous indifference to the federally protected rights of others." *Smith v. Wade*, 461 U.S. 30, 56 (1983). The standard for awards in §1983 actions is essentially the same as that for common law torts. *Id.* at 48-49, 51; see also *id.* at 48 n.13 (noting congruence between federal standard in §1983 actions and Oklahoma standard for punitive damages as described in *Smith v. Johnston*, 591 P.2d 1260, 1264 (Okla. 1978). In Oklahoma, a jury may award punitive damages for false arrest or malicious prosecution. *Moore v. Target Stores, Inc.*, 571 P.2d 1236, 1240-41 (Okla. Ct. App. 1977). The jury must find that the wrongdoer acted "willfully, wantonly or in reckless disregard of the rights of another, resulting in injury." *White v. Conoco, Inc.*, 701 F.2d 1442, 1448 (10th Cir. 1983).

There is ample evidence in the record from which the jury could have concluded that T.G.&Y. acted with reckless disregard or callous indifference to Vaughn Lusby's rights. T.G.&Y. kept the criminal charges against the Lusbys pending for over seven months even though it knew within minutes of apprehending Vaughn Lusby that he had paid for the sunglasses that he allegedly shoplifted. Malice is an element of the tort of malicious prosecution, for which the jury found T.G.&Y. liable. Similarly, the thrust of the Lusbys' civil rights claim was that T.G.&Y. abused its position of trust with the city by maliciously prosecuting the Lusbys upon citizen's complaints. Therefore, we must uphold the jury's award of punitive damages.

VI

T.G.&Y. and Gent contend that the trial court erred in instructing the jury on future medical expenses and future loss of earnings, citing *Carraco Oil Co. v. Morhain*, 380 P.2d 957 (Okla. 1963). In *Carraco* the court held that there was no basis for the jury to assess future medical expenses for the cost of an operation when the plaintiff did not present any testimony that he would have to undergo the operation. *Id.* at 959. Nevertheless, the

court did not set aside the jury's verdict. Instead, it affirmed but reduced the verdict by an amount representing the maximum cost of the disputed operation. *Id.* at 961. The following year, the Oklahoma Supreme Court explained its holding in *M.K.&O. Airline Transit Co. v. Deckard,* 397 P.2d 888,889 (Okla. 1964), saying that *Carraco* "did not require to be shown the probable cost of further medical needs." The court's concern was merely that the evidence in the case show with reasonable certainty the necessity for future medical needs." The court's concern was merely that the evidence in the case show with reasonable certainty the necessity for future expenditures. *Id.* The opinion in *M.K.&O. Airline Transit Co.* affirmed a jury verdict based on an instruction on future medical expenses when the plaintiff presented a doctor's report stating that the cause of his eye pain had not been determined and that the doctor advised observation and further studies. *Id.* Plaintiff's daughter, for whom he was also suing, was riding in the automobile when it crashed, and plaintiff presented evidence that she would probably need psychiatric treatment. *Id.* at 889.

The Lusbys did not present specific evidence suggesting they would require future medical treatment. They did present an expert, Moorman Prosser, M.D., who testified to some of the possible future physical and mental ailments that plaintiffs may suffer as a result of the T.G.&Y. incident. Dr. Prosser did not discuss even approximate damage amounts or specific courses of treatment. We cannot conclude with reasonable certainty that any of the Lusbys will require future medical care. Therefore, it was error for the judge to instruct the jury about such future medical expenses. Nevertheless, we conclude that it was harmless error that did not affect the jury's determination of damages. Dr. Prosser's testimony did not suggest any particular treatment that plaintiffs would have to undergo. As a result the jury did not hear any facts from which it could

have inferred that the Lusbys would incur future medical expenses. The size of the jury awards also indicate that it is unlikely they included any amount for future medical treatment.

We find no error in the court's giving the instruction on impairment of future earnings. Plaintiffs presented evidence that Vaughn's professional football career may have been impaired and that Solomon and Alvin may have suffered setbacks in seeking employment because of the stigma surrounding their arrest at T.G.&Y. It was up to the jury to weigh the credibility and significance of such evidence.

VII

All defendants argue that the trial court erred in awarding attorney's fees to plaintiffs in excess of the amount provided for in plaintiffs' contingent fee agreement with their attorneys. Our en banc decision in *Cooper v. Singer*, 719 F.2d 1496, 1503 (10th Cir. 1983), determined this issue. We there held that a fee award under U.S.C. §1988 is not limited by a contingent fee agreement between the client and his attorney. Therefore, the trial court did not err in awarding attorney's fees in excess of the amount that plaintiffs' attorneys would have received under the contingent fee agreement.

In view of our affirmance of the award against T.G.&Y. on the §1983 claims, we need not consider T.G.&Y.'s argument that those claims were so lacking in substance that the court could not assume pendent jurisdiction over the claims based upon state law. See *Mendoza v. K-Mart, Inc.*, 587 F.2d 1052, 1056-57 (10th Cir. 1979). We also need not consider whether a jury's general verdict for lump-sum damages may be upheld on appeal when the appellate court strikes down one of several bases for liability because we have upheld every basis of liability.

AFFIRMED.

ENDNOTES TO APPENDIX A

[1] In the only case in this circuit involving an off-duty policeman, *Draeger v. Grand Central, Inc.*, 504 F.2d 142 (10th Cir. 1974), the court assumed, and the parties apparently did not contest, than an off-duty policeman working as a security guard in a department store was acting under color of state law.

[2] Gent's confusion of his private and public roles is evident from his testimony about what information he needed as a private citizen to arrest Vaughn for suspected shoplifting. Vaughn was utlimately charged with violating Lawton Code §15-104, "Larceny; embezzlement," a misdemeanor offense covering thefts of less than $20. Gent thought he could make a citizen's arrest for a misdemeanor offense not committed in his presence if he had spoken to a reliable witness. Yet actually, Gent's immediate arrest of Vaughn was legal only if Gent was acting as a police officer at the time, and then only if the offense was committed in his presence.

Under Oklahoma law a peace officer may not make a lawful arrest without a warrant for a misdemeanor offense, unless the offense was committed or attempted in his presence. *Catron v. City of Ponca City*, 340 P.2d 504, 507 (Okla. Crim. App. 1959); *see also* Okla. Stat. Ann. tit. 22, §§ 196, 202; *cf. Utzman v. State*, 568 P.2d 641, 642 (Okla. Crim. App. 1977) (describing shoplifting *in presence* of a peace officer). Presumably an ordinary citizen may not conduct such an arrest either. Oklahoma has modified the law slightly for shoplifting situations so that a peace officer may arrest any person if he has "probable cause for believing [the person] has committed larceny of merchandise held for sale in retail or wholesale establishments, when such arrest is made in a reasonable manner." Okla. Stat. Ann. tit. 22, § 1342. But this statutory exception only applies to peace officers. *Cf.* Okla. Stat. Ann. tit. 22, § 1343 (authorizing mere detention for a reasonable time by a merchant, his agent or employee). An off-duty police officer serving as a private security guard must comply with the requirements of a citizen's arrest. Stewart v. State, *527 P.2d 22, 24 (Okla. Crim. App. 1974).*

Gent admits that it was difficult for him to distinguish between his police officer duties and his citizen duties. This distinction may have been especially difficult because T.G.&Y. did not make any effort to train Gent about such subtleties prior to allowing him to work as a security officer.

[3] Gent originally signed the complaint against Alvin for assault on a police officer but his signature was later crossed out by Officer Wertz. The stated reason for insisting on handcuffing Alvin behind the back before leaving the T.G.&Y. was that his shoulder injury had not prevented him from hitting a police officer while at the store. Wertz testified in his deposition that he suggested to Gent that he change the assault on a police officer charge to simply assault because Gent was off-duty.

[4] See *Traver v. Meshriy*, 627 F.2d 934, 938 (9th Cir. 1980) (action under color of state law when bank guard responded to problem as police officer by identifying himself as such and showing his police identification); *Davis v. Murphy*, 559 F.2d 1098, 1101 (7th Cir. 1977) (action under color of state law when Milwaukee statute provided that police officers were always subject to duty; officers in question identified themselves as police and showed their badges and guns during a brawl they started); *Stengel v. Belcher*, 522 F.2d 438, 441 (6th Cir. 1975), *cert. dismissed*, 429 U.S. 118 (1976) (action under color of state law when regulation required off-duty police officer to take action "in any type of police or criminal activity" 24 hours a day); *Robinson v. Davis*, 447 F.2d 753, 758-59 (4th Cir. 1971) (no action under color of state law when plaintiffs knew that college security officials in police uniform were acting as private security guards), *cert. denied*, 405 U.S. 979 (1972); *Watkins v.Oaklawn Jockey Club*, 183 F.2d 440, 443 (8th Cir. 1950) (no state action when officer made no pretense that he was acting under state law).

[5] See *El Fundi v. Deroche*, 625 F.2d 195, 196 (8th cir. 1980) (action under color of state law when private security guard acted in concert with police officers or pursuant to customary procedures agreed to by police departments); *Duriso v. K-Mart*, 559 F.2d 1274, 1277 (5th Cir. 1977) (court upheld jury determination of action under color of law when store had a regular form it used to initiate criminal complaint against suspected shoplifters that was part of customary plan with police); *Smith v. Brookshire Brothers, Inc.*, 519 F.2d 93, 94-95 (5th Cir. 1975) (per curiam) (action under color of law when police took shoplifting suspects into custody according to prearranged plan whereby police did not conduct an independent investigation of the criminal charges), *cert. denied*, 424 U.S. 915 (1976); *cf. White v. Scrivner Corp.*, 594 F.2d 140, 143-44 (5th Cir. 1979) (no color of law because police department had policy of independently investigating before making arrests for shoplifting).

[6] In this case the jury found that Wertz and Dunegan had committed false arrests only against Solomon and Alvin; it found for Vaughn on the pendent false arrest claims only against Gent and T.G.&Y. The trial judge's instruction on the elements of the Oklahoma tort of false arrest parallels the elements of a § 1983 violation founded on events involving a false arrest: the police make a warrantless arrest without probable cause. In such circumstances it would seem the jury should have reached the same conclusion on both claims. Such inconsistency does not require reversal of the judgment, however, so long as there is sufficient evidence to support the jury's verdict on the claim on which they found liability. See *Malm v. United States Lines Co.*, 269 F. Supp. 731, 731-32 (S.D.N.Y.), *aff'd per curiam*, 378 F.2d 941 (2d Cir. 1967).

APPENDIX B: OPINION BELOW

[Denial of Petition for Rehearing entered by United States Court of Appeals for Tenth Circuit on January 9, 1985]

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

SOLOMON LUSBY, VAUGHN LUSBY and ALVIN JERARD LUSBY, Plaintiffs-Appellees,	)	
v.	)	Nos. 82-1721 82-1779
T.G.&Y. STORES, INC., an Oklahoma corporation; CITY OF LAWTON OKLAHOMA, a municipal corporation; CHARLES GENT; STEVE WERTZ; and KENT DUNEGAN, Defendants-Appellants.	)	

This matter comes on for consideration of the petitions for rehearing and suggestions for rehearing en banc filed by appellants City of Lawton, Oklahoma, and T.G.&Y. Stores, Inc. in the captioned cause.

Upon consideration whereof, the petitions for rehearing are denied by the panel that rendered the decision sought to be reheard.

The petition for rehearing having been denied by the panel to whom the case was argued and submitted, and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestions for rehearing en banc are denied.

HOWARD K. PHILLIPS, Clerk

/s/ Robert L. Hoecker
Chief Deputy Clerk

APPENDIX C: OPINION BELOW

[Judgment based on jury verdict entered by United States District Court for the Western District of Oklahoma against Petitioners on December 15, 1981.]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF OKLAHOMA

SOLOMON LUSBY, et al., Plaintiffs,	)	
vs.	)	CIV-80-751-W
T.G.&Y. STORES, INC., et al., Defendants.	)	

JUDGMENT

The jury having found in favor of Plaintiffs and against Defendants in the following amounts, the Court finds that Plaintiffs shall recover of the defendant T.G.&Y. actual and punitive damages of $74,000 and of the defendant Charles Gent $6,000, together with reasonable attorneys' fees of $53,665, against the above named defendants pursuant to 42 U.S.C. §1988;

THE COURT FURTHER FINDS that upon the jury verdict herein Plaintiffs shall recover of the defendant City of Lawton, $20,000; the defendant Wertz, $5,000; and the defendant Dunegan $4,000, together with reasonable attorneys' fees of $21,335 against these three defendants pursuant to 42 U.S.C. §1988.

THE COURT FURTHER FINDS that Plaintiffs are entitled to recover of Defendants expenses of $5,431.49 together with costs to be taxed by the Clerk against the defendants.

IT IS SO ORDERED this 15th day of December, 1981.

/s/ Lee R. West
UNITED STATES DISTRICT JUDGE

ENTERED IN JUDGMENT DOCKET ON 12-15-81

CERTIFICATE OF SERVICE

I, Michael W. Hinkle, a member of the Bar of the Supreme Court of the United States and counsel of record for T.G.&Y. Stores, Inc., Petitioner herein, hereby certify that on May 8, 1985, pursuant to Rule 28, Rules of the Supreme Court, I served three copies of the foregoing Petition for Writ of Certiorari on each of the parties herein, as follows:

On Solomon Lusby, Vaughn Lusby and Alvin Jerard Lusby, Respondents herein, by depositing such copies in the United States Post Office, Oklahoma City, Oklahoma, with first class postage prepaid, properly addressed to the Post Office address of Jack L. Kinzie and Gretchen A. Harris, and to Linda G. Scoggins, the above named Respondents' counsel of record, at Andrews, Davis, Legg, Bixler, Milsten and Murrah, 500 West Main Street, Oklahoma City, Oklahoma 73102.

On the City of Lawton, Oklahoma, a separate Petitioner herein, by depositing such copies in the United States Post Office, Oklahoma City, Oklahoma, with first class postage prepaid, properly addressed to the Post Office address of Russell D. Bennett, the above named Petitioner's counsel of record, at 103 S.W. 4th Street, Lawton, Oklahoma, 73501.

All parties required to be served have been served.

Dated May 8, 1985.

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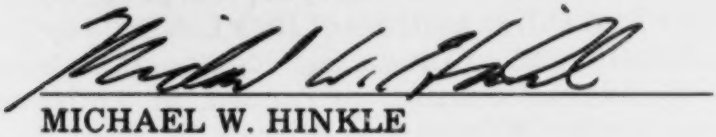

MICHAEL W. HINKLE

III. T.G.&Y.'S ATTEMPT TO REARGUE EVIDENCE PRESENTED BELOW DOES NOT MERIT REVIEW BY THIS COURT.

A. T.G.&Y. Does Not Challenge The Submission Of Or Its Demonstrated Liability Founded On Pendent Claims, Thus Providing An Independent Basis For The Jury Verdict Which Precludes Review.

Because the jury specifically found, and T.G.&Y. does not challenge, its liability on various pendent state claims, including false arrest, as to all the Lusby brothers, should this Court question whether the §1983 liability was appropriate the result would still be the same. T.G.&Y. is liable to the Lusby brothers for damages as determined by the jury. Clearly, the petition for a writ of certiorari must be denied.

B. T.G.&Y.'s Issue Is Wholly Factual And Presents No Novel Question Or Conflict Of Law.

T.G.&Y. does not challenge the trial and appellate courts' findings that its employee, Gent, acted under color of law. Moreover, according to T.G.&.Y.'s *own* statement at page seven of its petition for a writ of certiorari, the only issue raised is whether, *under these facts*, T.G.&Y. can be said to have acted under color of law. Because the determination of this question depends on the unique facts attendant to the false arrest, incarceration and continued prosecution of the Lusby brothers and raises no question of law which would impact on future litigants, this case does not merit review by this Court.

T.G.&Y. attempts to present this case in the posture of findings of the appellate court, ignoring the fact that the appellate court's recitation of the evidence on which T.G.&Y.'s liability was predicated wa- based on substantial and competent evidence pre-

sented at the trial court level. The question whether T.G.&Y. acted under "color of law" was fully and completely considered at the trial court level; the facts adduced before the trial court support the determination that T.G.&Y. acted under "color of law."

T.G.&Y. merely argues there was no evidence supporting its willful participation in concerted activity. However, evidence to the contrary was demonstrated at trial. T.G.&Y. relied solely on the Lawton police force for training of its security guards. At trial T.G.&Y. explicitly admitted it had determined to hire *only* Lawton police officers as security guards. (Tr. 890). Testimony indicated that T.G.&Y. allowed one such Lawton police officer/security guard to virtually hire the other security guards. (Tr. 737). T.G.&Y.'s manager's own testimony indicated that no background check was performed. (Tr. 845, 846). According to T.G.&Y.'s own testimony it has maintained a policy whereby, during the arrests of shoplifters, members of the Lawton Police Department filled out citizen's arrest forms which should have been filled out by T.G.&Y. (Tr. 858, 859). No investigation of shoplifting was done by Lawton police officers at the time they were called to the store (Tr. 857, 858), nor was there even a requirement of T.G.&Y. by Lawton that all the proper forms be filled out at the time of arrest. T.G.&Y. successfully created a scenario in which it had authority to bring its own criminal charges by initiating a citizen's complaint because T.G.&Y. knew Lawton would not exercise any check on such charges. In this instance it was the very fact of Gent's status as a Lawton police officer and T.G.&Y.'s use of that status that created the scenario in which the Lusby brothers were officially incarcerated, physically abused and then maliciously prosecuted for more than seven months.

These facts, in addition to those articulated by the appellate court, support the trial court's finding and

the jury verdict. The authority cited by the appellate court clearly creates no conflict with the facts here, nor has T.G.&Y. raised any conflict with other established cases. Furthermore, the appellate court recognized, at n.5 of its opinion (App. A, p. 23a, T.G.&Y. petition), the apposite authority persuasive to its decision. *El Fundi v. Deroche*, 625 F.2d 195, 196 (8th Cir. 1980); *Duriso v. K-Mart*, 559 F.2d 1274, 1277 (5th Cir. 1977); *Smith v. Brookshire Brothers, Inc.*, 519 F.2d 93, 94-95 (5th Cir. 1975) (per curiam), *cert. denied*, 424 U.S. 915 (1976); *Cf., White v. Scrivner Corp.*, 594 F.2d 140, 143-44 (5th Cir. 1979) (no color of law because police department had policy of independently investigating before making arrests for shoplifting).

Moreover, T.G.&Y.'s argument that its demand of a release of civil liability is a basis for a finding that it acted under color of law is erroneous. The Tenth Circuit found that T.G.&Y.'s demand of a release was one of the acts which caused the violation — not the act that created the "color of law" requirement. As the court stated:

> Acting under color of state law, T.G.&Y. violated the plaintiffs' constitutional rights when it used the threat of criminal charges as a bargaining chip for a release of civil liability. The evidence suggested that T.G.&Y.'s policy was always to seek a release of liability as a condition for dropping criminal charges. T.G.&Y. even had a special form made up that required suspects to confess their guilt and release T.G.&Y., its officers and employees from all claims for damages.

App. A, p.13a, T.G.&Y. petition.

Additionally, T.G.&Y.'s apparent belief that the appellate court held that T.G.&Y. acted under color of law when it failed to dismiss charges against the Lusby brothers under an Oklahoma state statute which provides that a complaining party may, after satisfac-

tion, cause criminal charges to be dismissed is a misreading of the court's opinion. The abuse of the statute was not a basis for the "color of law" requirement; it was a basis for liability. Here T.G.&Y. has not contested its liability for the false arrest — only that it acted under color of law. Its insubstantial arguments challenging the finding of liability do not warrant review.

CONCLUSION

Because petitioners present only questions of fact bereft of any federal or constitutional questions of great import, and because the decision below is consistent with apposite rulings of this Court and circuit courts, the petitions for writs of certiorari must be denied.

Respectfully submitted,

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June, 1985

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